

Before the
Federal Communications Commission
Washington, D.C. 20554

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| In The Matter of The Application of |) | |
| |) | |
| Hilco Communications, Inc. |) | |
| Assignor |) | |
| |) | MB Docket No. 02-236 |
| and |) | |
| |) | |
| Cumulus Licensing Corp. |) | |
| Assignee |) | File No. BALH-20010731ACB |
| |) | |
| For Consent to Assignment of License of |) | |
| KAYD-FM, Silsbee, Texas |) | |
| |) | |
| |) | |

HEARING DESIGNATION ORDER

Adopted: August 15, 2002

Released: September 5, 2002

By the Commission:

1. In this order, we consider the unopposed above-captioned application for the assignment of the license of station KAYD-FM, Silsbee, Texas (formerly KLOI(FM)), from Hilco Communications, Inc. ("Hilco") to Cumulus Licensing Corp. ("Cumulus"). Because this application was pending when we adopted the Notice of Proposed Rulemaking in MM Docket No. 01-317, we consider the competition concerns raised by this application pursuant to the interim policy adopted in that notice.¹ As discussed more fully below, we cannot find on the record that grant of this application is consistent with the public interest. Accordingly, pursuant to Section 309(e) of the Communications Act of 1934, as amended ("the Communications Act"),² we hereby designate the application for hearing.³

¹ See *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861, 19894-97 ¶¶ 84-89 (2001) ("Local Radio Ownership NPRM").

² 47 U.S.C. § 309(e).

³ In making our determination to designate this application for hearing, we have also considered certain data and arguments presented by Clear Channel Broadcasting Licenses, Inc. ("Clear Channel") with regard to its application for assignment of the license of KCOL-FM, Groves, Texas, which is in the same Arbitron "metro" as KAYD-FM. (A "metro" is a metropolitan area defined by the Arbitron rating service, which is used by radio stations and radio advertisers in negotiating and determining advertising rates.) Clear Channel and Cumulus have in their respective cases presented sometimes conflicting data and arguments with regard to the competitive conditions in this particular metro market. To the extent that the data and arguments presented by Clear Channel have a specific bearing on our analysis of the competitive impact of the instant Cumulus transaction, we consider them herein. In a separate order being released today, we also designate for hearing Clear Channel's application.

I. INTRODUCTION

2. For much of its history, the Commission has sought to promote diversity and competition in broadcasting by limiting the number of radio stations a single party could own or acquire in a local market.⁴ In March 1996, the Commission relaxed the numerical station limits in its local radio ownership rules in accordance with Congress's directive in Section 202(b) of the Telecommunications Act of 1996.⁵ Since then, the Commission has granted thousands of assignment and transfer of control applications proposing transactions that complied with the new limits. In certain instances, however, the Commission has received applications proposing transactions that would comply with the new limits, but that nevertheless would produce concentration levels that raise significant concerns about the potential impact on the public interest.

3. In response to these concerns, the Commission concluded that it has "an independent obligation to consider whether a proposed pattern of radio ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local radio market and[,] thus, would be inconsistent with the public interest."⁶ In August 1998, the Commission also began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concerns.⁷ Under this policy, the Commission flags proposed transactions that would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market.⁸ The public notice for a flagged transaction indicates that the Commission intends to subject the proposed transaction to further competition review and seeks comments from the public on that issue.⁹

4. On November 8, 2001, we adopted the *Local Radio Ownership NPRM*. We expressed concern that "our current policies on local radio ownership [did] not adequately reflect current industry conditions" and had "led to unfortunate delays" in the processing of assignment and transfer

⁴ See *Local Radio Ownership NPRM*, 16 FCC Rcd at 19862-70 ¶¶ 3-18.

⁵ See 47 C.F.R. § 73.3555(a)(1); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) § 202(b)(1).

⁶ *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13043 ¶ 8 (1999) (citing 47 U.S.C. § 309(a) and *KLXX, Inc.*, 13 FCC Rcd 15685 (1998)). See also *Shareholders of Citicasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19135, 19141-43 ¶¶ 12-16 (1996).

⁷ See Public Notice, Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998).

⁸ See *AMFM, Inc.*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000).

⁹ See generally *Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 18. A flagged public notice includes the following language:

Note: Based on our initial analysis of this application and other publicly available information, including advertising revenue share data from the BIA database, the Commission intends to conduct additional analysis of the ownership concentration in the relevant market. This analysis is undertaken pursuant to the Commission's obligation under Section 310(d) of the Communications Act, 47 U.S.C. Section 310(d), to grant an application to transfer or assign a broadcast license or permit only if so doing serves the public interest, convenience and necessity. We request that anyone interested in filing a response to this notice specifically address the issue of concentration and its effect on competition and diversity in the broadcast markets at issue and serve the response on the parties.

applications.¹⁰ Accordingly, we adopted the *Local Radio Ownership NPRM* “to undertake a comprehensive examination of our rules and policies concerning local radio ownership” and to “develop a new framework that will be more responsive to current marketplace realities while continuing to address our core public interest concerns of promoting diversity and competition.”¹¹ In the *NPRM*, we requested comment about possible interpretations of the statutory framework, including whether the new numerical station ownership limits definitively addressed the permissible levels of radio station ownership, whether they addressed diversity concerns only, or whether they established rebuttable presumptions of ownership levels that were consistent with the public interest. We also requested comment on how we should define and apply our traditional goals of promoting diversity and competition in the modern media environment. The *NPRM* also sought comment on how we should implement our policies toward local radio ownership.

5. In the *Local Radio Ownership NPRM*, we also set forth an interim policy to “guide [our] actions on radio assignment and transfer of control applications pending a decision in this proceeding.”¹² Although we recognized the need to “handle currently pending radio assignment and transfer applications and to address any future applications filed” while the *NPRM* is pending, we disavowed any intent to prejudge the “ultimate decision” in the rulemaking and rejected any “fundamental” changes to our current policy pending completion of the rulemaking.¹³

6. Under our interim policy, “we presume that an application that falls below the [50/70] screen will not raise competition concerns” unless a petition to deny raising competition issues is filed. For applications identified by the 50/70 screen, the interim policy directs the Commission’s staff to “conduct a public interest analysis,” including “an independent preliminary competitive analysis,” and sets forth generic areas of inquiry for this purpose.¹⁴ The interim policy also sets forth timetables for staff recommendations to the Commission for the disposition of cases that may raise competition concerns.

II. BACKGROUND

7. On July 31, 2001, the applicants filed the above-captioned application to assign the license of station KAYD-FM (formerly KLOI(FM)) from Hilco to Cumulus.¹⁵ Cumulus currently programs KAYD-FM pursuant to a Local Marketing Agreement (“LMA”). Cumulus also is the licensee of four stations in the Beaumont-Port Arthur, Texas Arbitron metro (“Beaumont metro”):¹⁶ KIKR(AM), Beaumont, Texas; KQHN(AM), Nederland, Texas; KQXY-FM, Beaumont, Texas; and KTCX(FM), Beaumont, Texas. After its proposed acquisition, Cumulus would own three FM stations and two AM stations in the Beaumont metro. Three other FM stations and one AM station in the Beaumont metro are currently owned by Clear Channel, the second largest group owner in the market. As noted above,

¹⁰ *Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 19.

¹¹ *Id.*

¹² *Id.* at 19894 ¶ 84.

¹³ *Id.*

¹⁴ *Id.* at 19895 ¶ 86.

¹⁵ The application was amended on March 28, 2002, and further on May 23, 2002.

¹⁶ See *supra* note 3.

Clear Channel has pending an application to buy another FM station in the Beaumont metro, KCOL-FM (formerly KTFA(FM)), Groves, Texas.

8. After agreeing to purchase KAYD-FM from Hilco, Cumulus, either alone or in conjunction with Hilco, took the following actions. Cumulus is also the licensee of KRWP(FM), which is licensed to Beaumont, Texas, and which formerly had the call sign KAYD-FM. Cumulus changed the call sign of this station to KRWP(FM),¹⁷ changed the station's format from Country to Urban, and requested that Arbitron move the station from the Beaumont Arbitron metro to the Houston-Galveston Arbitron metro ("Houston metro"). Cumulus states that KRWP(FM) now serves listeners in the Houston area and targets Houston area advertisers.¹⁸ At the same time, Cumulus and Hilco changed the call sign of KLOI(FM) to KAYD-FM, and changed the format of the station to Country. Cumulus states that the overall effect of these changes was a "frequency move" of Cumulus's "popular Country format" on KAYD-FM.¹⁹ In other words, to Beaumont listeners, it was as if KAYD-FM had simply changed frequencies on the FM dial.

9. On August 17, 2001, the Commission issued a public notice indicating that Cumulus's and Hilco's application had been accepted for filing.²⁰ The public notice also "flagged" the application pursuant to the Commission's "50/70" screen. Based on Year 2001 revenue figures provided by Cumulus and Clear Channel and the estimates in the BIA database,²¹ the five stations that Cumulus proposes to own in the Beaumont metro account for a 37.4 percent revenue share. The top two groups (Cumulus and Clear Channel) would collectively own 9 of the 17 commercial radio stations home to the Beaumont Arbitron metro, would own six of the seven commercial FM stations and operate the seventh pursuant to an LMA, and would account for 94.5 percent of the local advertising revenues and 85.3 percent of the listeners of the Beaumont metro radio stations.

10. There were no comments filed in response to the public notice that flagged the above-captioned application. The Mass Media Bureau sent an inquiry letter on March 15, 2002, providing Cumulus and Hilco an opportunity to update the record in light of competitive changes that had occurred in the Beaumont market and in light of the interim policy.²² Cumulus filed its response April 12, 2002.²³ We designate the application for hearing based on the record before us.

¹⁷ Effective January 1, 2002, Cumulus changed the call sign of KAYD-FM to KKTT(FM); effective January 18, 2002, Cumulus changed the call sign to KRWP(FM).

¹⁸ Letter from Bruce D. Ryan and Kathrine L. Calderazzi, Paul, Hastings, Janofsky & Walker LLP to Peter H. Doyle, Chief, Audio Services Division, Media Bureau (April 12, 2002) ("Cumulus Letter") at 6-7.

¹⁹ *Id.* at 2-3.

²⁰ See Public Notice, Broadcast Applications, Report No. 25051 (rel. August 17, 2001).

²¹ Cumulus and Clear Channel have each provided revenue figures for 2001. See *infra* ¶ 24. BIA is a communications and information technology, investment banking, consulting, and research firm. BIA provides strategic funding, consulting and financial services to the telecommunications, Internet, and media/entertainment industries. Unless otherwise specified, references throughout this document to BIA data refer to the year 2001 data made available to the public on June 4, 2002.

²² Letter from Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau, to David D. Burns, Paul Hastings Janofsky & Walker, LLP and Howard M. Weiss, Fletcher Heald & Hildreth, PLC (dated March 15, 2002).

²³ See *supra* note 18.

III. DISCUSSION

A. Framework for Analysis Under Interim Policy

11. Section 310(d) of the Communications Act requires the Commission to find that the public interest, convenience and necessity would be served by the assignment of Hilco's radio broadcast license to Cumulus before the assignment may occur.²⁴ Under the interim policy set forth in our *Local Radio Ownership NPRM*, we conduct a public interest analysis, including but not limited to an independent preliminary competition analysis of the proposed transaction based on publicly available information and information in the Commission's records.²⁵

12. Under the interim policy, to decide whether a proposed assignment serves the public interest, we first determine whether it complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules, including our local radio ownership rules. If it does, we then consider any potential public interest harms of the proposed transaction as well as any potential public interest benefits to determine whether, on balance, the assignment serves the public interest.²⁶

13. The Commission's analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles. While an antitrust analysis, such as that undertaken by the Department of Justice or the Federal Trade Commission, focuses solely on whether the effect of a proposed merger "may be substantially to lessen competition" in the advertising market,²⁷ our focus is different.²⁸ Our analysis of radio license assignments is informed by how those antitrust experts look at competition issues, yet our authority arises out of the Communications Act, which is not concerned solely with the potential impact of

²⁴ 47 U.S.C. § 310(d).

²⁵ *Local Radio Ownership NPRM*, 16 FCC Rcd. at 19895-96 ¶ 86.

²⁶ *Id.* at 19895 ¶ 85; see *VoiceStream Wireless Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9789 ¶ 17 (2001); see also *Chet-5 Broadcasting, L.P.*, 14 FCC Rcd at 13043 ¶ 8 (holding that the Commission has "an independent obligation to consider whether a proposed pattern of radio station ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local market and thus would be inconsistent with the public interest").

²⁷ 15 U.S.C. § 18.

²⁸ Although the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies may find based solely on antitrust laws. See *FCC v. RCA Communications*, 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure."). See also *RCA Communications*, 346 U.S. at 94; *United States v. FCC*, 653 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.*, 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agency to "analyze proposed mergers under the same standards that the Department of Justice . . . must apply.").

economic concentration on advertisers, but ultimately seeks to maximize the utility that the public derives from the public airwaves. The Commission's public interest evaluation is therefore not limited to competition concerns but necessarily encompasses the "broad aims of the Communications Act."²⁹ These broad aims include, among other things, ensuring the existence of an efficient, nationwide radio communications service, available to everyone and promoting locally oriented service and diversity in media voices.³⁰ Our public interest analysis therefore includes assessing whether the transfer will affect the quality of radio services or responsiveness to the local needs of the community,³¹ and whether it will result in the provision of new or additional services to listeners.³²

14. Thus, under our interim policy, where a proposed transaction raises concerns about economic concentration, we will consider evidence that the particular circumstances of a case may mitigate any adverse impact to radio listeners that might otherwise result, as well as any evidence of benefits to radio listeners that might result from the proposed transaction. Ultimately, it is the potential impact of the transaction on listeners that will determine whether we can find that, on balance, grant of a particular radio station assignment or transfer of control application serves the public interest.

B. Local Radio Ownership Rules

15. The Commission's local radio ownership rules restrict the number of radio stations in the same service and the number of stations overall that may be commonly owned in any given local radio market.³³ A local radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned.³⁴ Under the rules, as amended by the Telecommunications Act of 1996, in a local radio market with 45 or more commercial radio stations, a single entity may own up to eight commercial radio stations, no more than five of which are in the same service; in a market with 30 to 44 commercial radio stations, one owner may hold up to seven commercial radio stations, no more than four of which are in the same service; in a market with 15 to 29 stations, a single owner may own up to six stations, no more than four of which are in the same service; and in a market with 14 or fewer stations, one owner may hold up to five stations, no more than three of which are in the same service, except that no single entity may control more than 50 percent of the stations in such a market.³⁵

²⁹ See *AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168-69 ¶ 14 (1999); *WorldCom, Inc.*, Memorandum Opinion & Order, 13 FCC Rcd 18025, 18030-31 ¶ 9 (1998) ("*WorldCom-MCI Order*").

³⁰ For example, the Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

³¹ See *Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 994-97 (1981); *Sixth Report and Order*, Docket No. 8736, 1 RR 91:559, :624 (1952).

³² See, e.g., *WorldCom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9.

³³ 47 C.F.R. § 73.3555(a).

³⁴ *Id.*; see *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

³⁵ 47 C.F.R. § 73.3555(a)(1); see Telecommunications Act of 1996, § 202(b)(1).

16. We find that Cumulus's proposed acquisition of KAYD-FM is consistent with the numerical limits in our local radio ownership rules. Cumulus's multiple ownership showing indicates that, using the Commission's current definition of "radio market,"³⁶ the transaction creates one radio market composed of more than 45 radio stations. In this market, a single licensee may, therefore, own up to eight radio stations, not more than five of which are in the same service (AM or FM). If Cumulus acquires KAYD-FM, it will own seven stations (five FM and two AM) in this market. The transaction therefore complies with the local radio ownership rules.

C. Public Interest Analysis Under Interim Policy

17. Having concluded that the proposed transaction is consistent with the numerical limits set forth in our ownership rules, we turn now to our competition analysis. As noted above, here we find that the proposed transaction would create a market in which the top two group owners would own six of the seven commercial FM stations in the Arbitron metro (and program the seventh pursuant to an LMA), and their combined share of the local radio advertising market would be 94.5 percent. Based on the record before us, we find that Cumulus has failed to demonstrate particular circumstances in this market sufficient to overcome a concern that these levels of economic concentration in this market would harm the public interest. To the extent that Cumulus presents generic arguments challenging the parameters of our current competition analysis, we will address such concerns in the context of the *Local Radio Ownership NPRM* and will not consider them here. Rather, we look to determine whether there are unique facts that persuade us that grant of this assignment application would serve the public interest despite the increase in market power it would apparently create. On this basis, we are unable to conclude that the public interest would be served by a grant of the application. Accordingly, under Section 309(e), we must designate this matter for hearing.

18. In order to set the stage for the hearing in this case, we detail below the specific market conditions that lead to our conclusion that the level of economic concentration in this market in the wake of this transaction would be contrary to the public interest. We recognize that Cumulus may elect to forego a hearing at this time and instead wait until the conclusion of the rulemaking proceeding where we will consider the generic arguments it has presented.

19. *Radio Advertising as the Relevant Product Market.* Pursuant to our interim policy, we presume that the relevant product market is radio advertising.³⁷ However, we consider evidence from the parties that the relevant product market in a specific case includes other forms of media advertising or should be based on listenership rather than advertising. Cumulus asserts that in the Beaumont metro, and in most other places, radio stations face substantial competition from other advertising outlets, including broadcast television, cable, newspapers, outdoor advertising, telephone directories and other print media.³⁸ Moreover, Cumulus argues, because the approach of the Department of Justice/Federal Trade Commission Horizontal Merger Guidelines is fact-specific,³⁹ it is inappropriate for the Commission to establish a presumption that radio advertising is a market.⁴⁰ However, Cumulus

³⁶ See *Definition of Radio Markets*, Notice of Proposed Rule Making, 15 FCC Rcd 25077 (2000).

³⁷ *Local Radio Ownership NPRM*, 16 FCC Rcd at 19895 ¶ 86.

³⁸ Cumulus Letter at 4.

³⁹ *Horizontal Merger Guidelines*, U.S. Dept. of Justice and the Federal Trade Comm'n (rev'd 1997) ("*Horizontal Merger Guidelines*").

⁴⁰ Cumulus Letter at 4.

provides no evidence to support its assertion that the relevant product market is broader than radio advertising in the Beaumont metro. Accordingly, for purposes of this order we continue to assume that radio advertising is the relevant product market.

20. *The Arbitron Metro as the Relevant Geographic Market.* Pursuant to our interim policy, we presume that the relevant geographic market is the Arbitron metro. However, we consider evidence from the parties that the relevant geographic market in a specific case may be larger, smaller, or otherwise different from the Arbitron metro. Cumulus asserts that the Commission's assumption that the Arbitron metro is a proper geographic market is inappropriate generally and especially in Beaumont where other population centers are nearby.⁴¹ Cumulus further states that Arbitron does not draw metros for the purpose of competition analysis, and it does not necessarily include all stations that may be able to provide service to listeners in the metro or sell advertising to the same local businesses.⁴² However, Cumulus offers no alternative geographic market definition. Accordingly, for purposes of this order, we continue to assume that the Arbitron metro, in this case, the Beaumont-Port Arthur, Texas metro, represents the appropriate geographic market.

21. *Market Participants.* Current BIA data show 17 commercial and two non-commercial "in-market" stations in the Beaumont metro. BIA also identifies 24 out-of-market stations that have some listeners in the Beaumont metro (although their current share may be zero). Citing Clear Channel's response filed in connection with Clear Channel's application to acquire KCOL-FM in the Beaumont metro,⁴³ Cumulus argues that examining only those stations in the BIA database that designate the metro as their "home" likely understates the number of participants in the market.⁴⁴ The cited Clear Channel Letter states that, while Beaumont has 17 "home" commercial stations, 19 commercial radio stations that report the Houston metro as their home have a reportable share in the Beaumont metro.⁴⁵ Cumulus states (as does Clear Channel) that four of those Houston home stations are licensed to communities that lie within the Beaumont metro, including one station owned by Cumulus, KRWP(FM).⁴⁶ According to BIA data, 15 commercial out-of-market stations had a reportable share in the Beaumont metro in the latest rating period; of these, seven had a reportable share of 1.0 or greater in the Beaumont metro. However, Cumulus and Clear Channel together own three of the seven stations with shares of 1.0 or greater, including the top rated "out-of-market" station, KRWP(FM).

22. For ease of analysis, the out-of-market stations that garner some listeners in the Beaumont metro can be divided into two groups: the four stations licensed to localities within the Beaumont metro

⁴¹ *Id.* at 5.

⁴² *Id.*

⁴³ Letter from Christopher L. Robbins to Peter H. Doyle, Chief, Audio Services Division, Media Bureau (April 4, 2002) ("Clear Channel Letter").

⁴⁴ Cumulus Letter at 6.

⁴⁵ See Clear Channel Letter at 3.

⁴⁶ Cumulus Letter at 7-8; Clear Channel Letter at 3. The stations are KRWP(FM), Beaumont, Texas; KQQK(FM), Beaumont, Texas; KQBU-FM, Port Arthur, Texas; and KTJM(FM), Port Arthur, Texas. Clear Channel also states that Hispanic Broadcasting Corp., which is the licensee of KQBU-FM, along with a Houston metro station in nearby Winnie, Texas, KRTX(FM) (now KLAT-FM), has a sales representative dedicated to selling advertising time on the stations to businesses in the Beaumont area. Clear Channel Letter at 3, Exh. 1 ¶ 4. Clear Channel does not indicate, however, whether the Beaumont businesses Hispanic Broadcasting Group targets are seeking to reach Beaumont metro listeners or Houston metro listeners.

(cited by Cumulus and Clear Channel as well)⁴⁷ and the eleven stations licensed to localities in other metros. With regard to the first group, while Cumulus generally argues that the Commission is wrong to omit out-of-market stations as market participants, Cumulus also argues that KRWP(FM), which has the highest Beaumont listenership of any out-of-market station and which is actually licensed to Beaumont, should *not* be included when calculating the revenue shares for the Beaumont market.⁴⁸ As stated above, Cumulus states that KRWP(FM) targets advertisers in Houston, and that Beaumont advertisers would not use KRWP(FM) to reach Beaumont listeners but would instead use Cumulus station KTCX(FM), which has the same Urban format as KRWP(FM) but "significantly lower" rates.⁴⁹ Cumulus also argues that the three other stations in this group similarly focus their advertising efforts on Houston.⁵⁰ Cumulus has not presented sufficient evidence to overcome our presumption that these four out-of-market stations are not market participants in the Beaumont metro. Cumulus will, of course, have an opportunity at the hearing to present additional evidence to the contrary.

23. With regard to the second group of out-of-market stations that gain listening share in the Beaumont metro (the eleven stations not licensed to localities in the Beaumont metro), Cumulus does not provide information about the advertising strategy and rates of these stations, the amount of local Beaumont advertising they broadcast, or whether those stations even compete for local advertising. Moreover, the BIA data indicate that only five stations in this group have ratings of 1.0 or greater. Of these, Cumulus owns one and Clear Channel owns one.⁵¹ These two stations therefore do not present competitive alternatives to Cumulus's and Clear Channel's Beaumont stations. One other station with a rating greater than 1.0 (KTHT(FM)) has a format similar to a station home to the Beaumont metro.⁵² As stated above, Cumulus argues with respect to KRWP(FM) that advertisers seeking to reach Beaumont listeners would not choose KRWP(FM) because they could advertise instead on a Beaumont station with an identical format but lower rates. Applying that argument to KTHT(FM), which designates the Houston metro as its home, it is unlikely that advertisers would use KTHT(FM) to reach Beaumont listeners; they would instead be likely to use a Beaumont station with a similar format and lower rates. Thus, it does not appear that KTHT(FM) should be included as a market participant.⁵³ For all these reasons, we are unable to conclude on the record before us that the market participants in the Beaumont metro include more than the in-market stations listed in the BIA and Arbitron databases.

24. *Market Share and Concentration.* Under the interim policy, we presume that BIA revenue share estimates accurately reflect actual market shares. Cumulus contends, however, that using BIA's

⁴⁷ See text accompanying footnote 46.

⁴⁸ Cumulus Letter at 7.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Cumulus owns KYKZ(FM) and Clear Channel owns KTRH(AM).

⁵² KTHT(FM), Cleveland, Texas has a Contemporary Hit Radio/Dance format which is similar to the Contemporary Hit Radio format of KQXY(FM), Beaumont, Texas.

⁵³ Another "out-of-market" station with ratings greater than 1.0 -- KLAT-FM, Winnie, Texas -- may also have a format similar to a station in the Beaumont metro and may therefore be an unlikely market participant. KLAT-FM has a Spanish/Contemporary Hit Radio format, which is similar to the Spanish/Christian/News format of KUHD(AM), Port Neches, Texas. The BIA database, however, does not list any revenues or ratings for KUHD(AM).

data to determine market shares yields inaccurate results.⁵⁴ Cumulus states that BIA simply reports total advertising revenue earned by each station, regardless of where the revenues are earned. Moreover, Cumulus notes, BIA reports no revenues for out-of-market stations.⁵⁵ Cumulus provides no specific evidence to rebut the presumption contained in our interim policy that the BIA data are correct. It does not provide, for example, evidence of the amount of advertising revenues earned by Beaumont stations from advertisers seeking to reach out-of-market listeners. Cumulus also states that BIA overestimates the revenues for KAYD-FM, stating that the figure is \$342,000 rather than \$500,000. Cumulus states, however, that the BIA estimates of its other stations are slightly underestimated, and is \$3.47 million rather than \$3.15 million.⁵⁶ Likewise, in Clear Channel's response in its proceeding to acquire the license of KCOL-FM, Clear Channel contends that the BIA estimates of the revenues earned by its stations are incorrect.⁵⁷ Accepting, *arguendo*, Cumulus's and Clear Channel's figures in place of those provided by BIA for the stations they operate, the revenue and listening audience figures for the Beaumont metro are as follows:⁵⁸

| Owner | 2001 Market Revenue | Market Share | Fall 2001 Audience Share |
|-------------------------------|------------------------|--------------|--|
| Cumulus | \$3,470,000 | 34.0% | 28.1 (45.5% of in-market listenership) |
| KAYD-FM | <u>\$ 342,000</u> | <u>3.4%</u> | <u>1.7</u> (2.7% of in-market listenership) |
| | \$3,812,000 | 37.4% | 29.8 (48.2% of in-market listenership) |
| Clear Channel | \$5,827,000 | 57.1% | 22.9 (37.1% of in-market listenership) |
| KCOL-FM | <u>\$ 167,000</u> | <u>1.6%</u> | <u>7.9</u> (12.8% of in-market listenership) |
| | \$5,994,000 | 58.7% | 30.8 (49.8% of in-market listenership) |
| Others | <u>\$ 400,000</u> | <u>3.9%</u> | <u>1.2</u> (1.9% of in-market listenership) |
| In-market total | \$10,206,000 | 100.0% | 61.8% |
| <i>Out-of-market stations</i> | | | |
| Cumulus | | | 7.5 |
| Clear Channel | | | 1.7 |
| Cox Radio | | | 5.0 |
| Hispanic Broadcasting | | | 5.0 |
| Others | | | <u>3.2</u> |
| Out-of-market total | | | 22.4% |
| Ratings unaccounted for: | | | 15.8%* |

*This may include listeners of non-commercial stations, which are not rated by Arbitron, or listeners of commercial stations that are not rated by Arbitron.

⁵⁴ *Id.* at 8.

⁵⁵ *Id.*

⁵⁶ *Id.* at 8-9 & n.9.

⁵⁷ Clear Channel Letter at 4-5.

⁵⁸ Due to rounding, percentages in the table might not add precisely.

25. Our competition analysis using BIA data, as modified by Cumulus's and Clear Channel's figures, shows that the proposed transaction would increase Cumulus's share of the radio advertising revenues in the Beaumont market from 34.0 percent to 37.4 percent, and would increase Cumulus's share of the in-market commercial listenership from 45.5 percent to 48.2 percent. Cumulus's proposed acquisition of KAYD-FM would eliminate the independent station with the most advertising revenues in the Beaumont metro. The transaction would therefore entrench a duopoly market in the Beaumont metro, with the top two owners (Cumulus and Clear Channel) owning six of the seven commercial FM stations, and having a combined share of 94.5 percent of the in-market advertising revenues and 85.3 percent of the audience share attributable to in-market commercial stations.

26. The post-transaction level of market concentration and the change in concentration resulting from a transaction affect the degree to which a transaction raises competition concerns. Market concentration is often measured by the Herfindahl-Hirschman Index ("HHI"). In concentrated markets, the United States Department of Justice presumes that mergers raising the HHI more than 100 points "raise significant competitive concerns" and "are likely to create or enhance market power or facilitate its exercise."⁵⁹ Cumulus argues that the HHI figures calculated by the staff are incorrect because the Commission has improperly analyzed the product market, the geographic market, the market participants and the market shares.⁶⁰ As stated above, however, we find no reason in this case to vary from the presumptions in our interim policy that radio advertising is the relevant product market and that the relevant Arbitron metro, here Beaumont-Port Arthur, Texas, is the appropriate geographic market,⁶¹ and we have discussed Cumulus's arguments about market participants above.⁶² Cumulus also states that both the FCC and DOJ have recognized that mechanistic application of HHIs might yield misleading answers to competitive issues in radio mergers.⁶³ Although we agree that mechanical application of the *Horizontal Merger Guidelines* may provide misleading answers to competitive issues in the context of local radio transactions, as a general matter, sufficiently large HHIs establish a *prima facie* case in antitrust suits.⁶⁴ Finally, Cumulus argues that if the unrelated proposed Clear Channel transaction were not included, the HHI would change by less than 200.⁶⁵ That is still sufficient under the *Horizontal Merger Guidelines*, however, to raise competition concerns. In any event, our competition analysis based on BIA data as modified by Cumulus's and Clear Channel's own revenue figures shows that the proposed transaction (*i.e.*, not including the unrelated Clear Channel transaction) would result in an HHI of 4671 in the Beaumont radio advertising market with a change in the HHI of 228. We conclude that Cumulus has failed to present sufficient evidence to rebut the presumption that this describes a highly concentrated market.

27. *Existing Facilities/Barriers to Entry.* Where market share and concentration data suggest the potential for competition concerns, we examine the number, class, and signal contour of all existing stations in the radio market to determine their competitive significance. We recognize that there may be AM and FM facilities with good capacity, albeit low current advertising revenues, and our analysis

⁵⁹ *Horizontal Merger Guidelines*, § 1.51.

⁶⁰ Cumulus Letter at 9.

⁶¹ See *supra* ¶¶ 19-20.

⁶² See *supra* ¶¶ 21-23.

⁶³ *Id.*

⁶⁴ *FTC v. Heinz*, 246 F.3d 708, 716 (D.C. Cir. 2001).

⁶⁵ Cumulus Letter at 9.

considers the potential for these stations to provide effective competition in the future. In some cases there may be a sufficient number of such facilities remaining outside the largest group's (or two largest groups') control to provide a competitive challenge. That is not the case here. If this transaction were approved, in the Beaumont metro there would be seven commercial radio stations – all in the AM service and each individually owned – that would not be controlled or operated by the two largest groups.⁶⁶ The stations include five Class B stations, one Class C station, and one Class D station. According to the BIA database, only two of these stations have reported listenership and only three have any estimated revenues. Based on this record, it is unlikely that any of these stations will offer a viable competitive challenge in the future.

28. We also consider evidence regarding the possibility of entry by new stations, as well as any barriers to entry, and the timeliness, likelihood, and sufficiency of entry to counter any potential market power. In other words, we will examine whether new stations or stations that are not currently market participants would be able and likely to enter the market and prevent a price increase or other anticompetitive actions. Cumulus does not argue that there are any vacant allotments available for new stations to enter the market. Cumulus argues that any of the radio stations that are now not “home” to Beaumont, but that have facilities in or near the Beaumont metro, could engage in greater advertising in Beaumont, and would do so if there were any significant increase in advertising rates in Beaumont.⁶⁷ Cumulus has provided no evidence, however, as to whether any of these stations might consider designating the Beaumont metro as their home or the likelihood of them doing so in response to an increase in rates in Beaumont. Indeed, the available evidence suggests a strong affinity for the Houston market by Beaumont-area stations. Cumulus itself just redesignated KRWP(FM) as home to the Houston market, even though it is licensed to Beaumont. And, as stated above, Cumulus argues that the three other stations that are located within the Beaumont metro but designate Houston as their home have all upgraded their facilities and focused their marketing and sales efforts on Houston. Cumulus has not shown that it is likely that any of these three stations would leave Houston, the seventh largest BIA market, to move back into Beaumont, the 132nd largest BIA market, even in the face of significant price increases in the much smaller Beaumont market. Similarly, Cumulus has not shown that it is likely that any of the out-of-market stations that are licensed to communities close to Beaumont – but not actually in the Beaumont metro – would leave the Houston metro and focus their efforts on Beaumont. In fact, it would seem even less likely that these stations would shift their efforts to Beaumont because their facilities are more distant from Beaumont and it would likely require more effort and expense for them to serve that market. Based on our review of the record, we conclude that while there might be some possibility of entry into this market, there is no evidence that any entry would actually occur or that it would be sufficient to counteract any anticompetitive effects that might result from Cumulus's acquisition of KAYD-FM.

29. *Potential Adverse Competitive Effects: Unilateral and Coordinated Effects.* Under the interim policy, relevant evidence concerning the potential adverse competitive effects of a proposed transaction may include direct proof of adverse competitive effects or facts that demonstrate that structural conditions (e.g., a high market share and significant barriers to entry) will facilitate the exercise of market power. In evaluating the potential adverse competitive effects of a proposed transaction, under the interim policy, we also consider the effect on competition, if any, that may have resulted from a pre-existing LMA or joint sales agreement (“JSA”) between the applicants.

⁶⁶ In addition to owning four stations outright, Clear Channel currently operates KCOL-FM pursuant to an LMA and is seeking approval to purchase the station.

⁶⁷ Cumulus Letter at 12.

30. As stated above, Cumulus's acquisition of KAYD-FM would bring under its control what is now the independent station in the Beaumont metro with the highest revenues. It would entrench what is essentially a duopoly in the metro. The market is highly concentrated and, as noted above, there is no evidence that entry sufficient to restrain anticompetitive behavior is likely. This market structure increases the risk of coordinated behavior leading to inefficient price discrimination, division of advertising accounts, and lower quality programming.⁶⁸ As the D.C. Circuit has stated, "[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination. Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to . . . achieve profits above competitive levels. The creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices. . . . Tacit coordination 'is feared by antitrust policy even more than explicit collusion, for tacit coordination, even when observed, cannot be easily controlled directly by the antitrust laws. It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.'"⁶⁹

31. Cumulus argues that there have been no anticompetitive effects since Cumulus entered into its LMA with KAYD-FM; rather, both listeners and advertisers have benefited.⁷⁰ However, Cumulus has supplied no evidence to substantiate its claims, such as data demonstrating whether advertising rates have increased during this period. Cumulus also argues that in the radio industry unilateral anticompetitive behavior is constrained by the existence of close substitutes (radio stations of similar format in nearby cities) and the ease of format switching by radio stations.⁷¹ However, there is no evidence that such constraints exist in this case. Indeed, as Cumulus has noted, advertisers seeking to reach Beaumont-area listeners would *not* choose a Houston radio station with a similar format.⁷² More generally, Cumulus contends that it is "extremely unlikely" that any lessening of competition by coordinated behavior could result from the proposed transaction because the normal characteristics of radio advertising do not facilitate coordination, claiming that reaching an agreement on the many prices each radio station charges and policing any agreement would be very difficult.⁷³ Again, Cumulus has provided no evidence specific to the Beaumont market. As stated above, we will address Cumulus's general arguments regarding whether the characteristics of radio advertising facilitate coordinated behavior in the pending rulemaking proceeding.⁷⁴

32. *Efficiencies and Public Interest Benefits.* Under the interim policy, we consider evidence of economic efficiencies that the proposed transaction would produce and public interest benefits the proposed transaction would provide to listeners or advertisers, such as improvements in the quality, scope, and quantity of community responsive programming, improved community service, and the furtherance of localism. Parties asserting that a proposed transaction will produce efficiencies and other public interest benefits are required to show both how the transaction will produce those benefits and

⁶⁸ Granting Clear Channel's proposed acquisition of KCOL-FM would exacerbate this risk.

⁶⁹ *FTC v. Heinz*, 246 F.3d at 724-25 (quoting 4 Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law*, ¶ 901b2 at 9 (rev. ed. 1998)) (other quotations and citations omitted).

⁷⁰ Cumulus Letter at 3, 11.

⁷¹ *Id.*

⁷² See *supra* ¶¶ 21-23, 27-28.

⁷³ Cumulus Letter at 10-11.

⁷⁴ *Local Radio Ownership NPRM*, 16 FCC Rcd at 19884 ¶ 50.

how those benefits will flow through to listeners or advertisers. To be cognizable, efficiencies must be *transaction specific*, i.e., "efficiencies likely to be accomplished with the proposed transaction and unlikely to be accomplished in the absence of either the proposed transaction or another means having comparable anticompetitive effects."⁷⁵ Any claimed efficiencies resulting from a radio transaction should be substantiated and susceptible to verification by the Commission. Efficiencies that are vague, speculative, and unverifiable will not be considered in evaluating the competitive effects of the proposed transaction. Transaction-specific efficiencies that lower the marginal cost of production relative to one-time reductions in fixed costs are weighted much more heavily than fixed cost reductions as possible offsets to potential adverse effects on listeners and advertisers resulting from the transaction. Transaction-specific efficiencies that lower the marginal cost of production are likely to flow-through as benefits to listeners and advertisers in the form of improved programming and lower advertising prices, while reductions in fixed costs will not provide the same financial incentive for such flow-through of benefits. Any profit-maximizing firm, including a monopolist, will reduce the price of output in response to a reduction in the marginal cost of production. Reductions in fixed cost for the same firm will provide no incentive for such reductions in output price that would otherwise flow through transaction-specific benefits to listeners and advertisers.

33. Cumulus claims a number of efficiencies as a result of the sale. It asserts that consolidating the KAYD-FM facilities and staff with Cumulus's other facilities and staff in Beaumont will allow for significant cost savings.⁷⁶ It also states that it has made substantial improvements to KAYD-FM, which were unlikely to have been made without the LMA and proposed sale. These include purchasing two remote vehicles, upgrading equipment, and having a chief operator on site at all times.⁷⁷ Finally, Cumulus asserts that after the sale, KAYD-FM will dramatically improve its coverage of Beaumont by changing its transmitter location and increasing its power, which will allow KAYD-FM to provide competition to Clear Channel's country station.⁷⁸ Cumulus also asserts several public benefits. It states that listeners will benefit from a significant increase in locally selected and locally generated programming than was available on the station before the LMA. It claims that these benefits will increase when KAYD-FM's antenna is moved and it achieves better coverage of the Beaumont community.⁷⁹ Cumulus states that before the LMA, some of KAYD-FM's programming had been done out of San Antonio, with the programming director coming in approximately every other week; only a limited amount of broadcasting was live. Cumulus states that with the LMA, the station carries a substantial amount of live and locally originated programming: it has local newscasts twice an hour in the morning, and live morning, mid-day, afternoon and evening shows.⁸⁰ Cumulus also states that KAYD-FM now broadcasts more family-oriented events and promotions; is very involved in community events; and continually does market research to ensure its programming is responsive to the community.⁸¹

⁷⁵ See *Horizontal Merger Guidelines*, Section 4.

⁷⁶ Cumulus Letter at 12.

⁷⁷ *Id.* at 13.

⁷⁸ *Id.* at 13-14.

⁷⁹ *Id.* at 14.

⁸⁰ *Id.* at 15-16.

⁸¹ *Id.*

34. The record in this proceeding neither quantifies the magnitude of the transaction-specific efficiencies nor clarifies whether the efficiencies are properly attributable to one-time changes in fixed cost or to permanent reductions in marginal cost that provide a financial incentive to flow-through such efficiencies as benefits to listeners and advertisers. Additional specificity and documentation of claimed efficiencies should be developed during the hearing of this case. With respect to public interest benefits and transaction-specific efficiencies, it appears that many of the benefits listed by Cumulus are the result of transferring old KAYD-FM's operations to new KAYD-FM and do not represent new services provided to the community. Rather, the move of old KAYD-FM to the Houston market and the change of old KLOI(FM) to new KAYD-FM taken together represent a loss of service to the Beaumont community, although the addition of old KAYD-FM/new KRWP(FM) represents an increase in service to the Houston community. Thus, while Cumulus appears to be using its current LMA arrangements with KAYD-FM to realize cost savings and to invest in programming and improved equipment, we find the record in this proceeding insufficient to enable us to conclude that the claimed public interest benefits and transaction-specific efficiencies of this transaction outweigh the potential for competitive harm.

IV. CONCLUSION

35. On the basis of the information before us, as explained above, we are unable to make the required finding that the public interest, convenience and necessity will be served by granting the above-captioned application in light of the questions raised in the context of our competition analysis. Accordingly, we will designate the assignment application for hearing to determine, pursuant to Section 309(e) of the Communications Act, and based on the evidence to be adduced at hearing, whether the public interest, convenience and necessity will be served by the grant of the application.

V. ISSUES TO BE DETERMINED AT HEARING

36. Implementing our analytical framework described in the foregoing paragraphs, we direct the Administrative Law Judge ("ALJ") to examine in an evidentiary hearing the particular circumstances of the Beaumont, Texas market to determine whether the factual assumptions in paragraphs 19 through 34 above are correct. We further direct the ALJ to determine, in light of his or her conclusions, whether the transaction is likely to cause any anticompetitive harms, and to determine what, if any, public benefits would accrue from this transaction. Finally, we direct the ALJ to apply these findings to determine whether, on balance, grant of the application would serve the public interest. The ALJ should address the following specific issues.

37. Issue 1: *Product Market Definition*. Following our analytical framework and the *Horizontal Merger Guidelines*, the ALJ shall receive testimony, studies, and other relevant economic evidence that allows the determination of the relevant commercial radio product in the Beaumont metro. In the alternative, parties may stipulate that the relevant product market is "radio advertising," the presumptive product market definition in our analytical framework.

38. Issue 2: *Geographic Market Definition*. Following our analytical framework and the *Horizontal Merger Guidelines*, the ALJ shall receive testimony, studies, and other relevant economic evidence that allows the determination of the relevant commercial radio geographic market. In the alternative, parties may stipulate that the relevant geographic market is the Beaumont metro.

39. Issue 3: *Market Participants*. Given the findings with respect to Issues 1 and 2, the ALJ shall receive testimony and other relevant economic evidence that identifies all firms that participate in

the relevant product and geographic markets. Following the general methodology prescribed in the *Horizontal Merger Guidelines*, firms not currently producing or selling the relevant product in the relevant geographic market may be included if their inclusion reflects a probable supply response in reaction to a hypothetical increase in the price of the relevant product. Such firms are "uncommitted entrants" and may be induced to enter the relevant product and geographic markets within one year and without the expenditure of significant sunk costs of entry and exit in response to a small but significant and non-transitory increase in the price of the relevant product. If the parties stipulate that the relevant product and geographic markets are "radio advertising" and the "Arbitron metro," respectively, then market participants would include all operating commercial radio stations in the Beaumont metro plus any "dark" stations that might be expected to become operational in response to a small but significant and non-transitory increase in the price of radio advertising.

40. Issue 4: *Market Shares*. The ALJ shall receive testimony or other economic evidence that will facilitate the calculation of market shares for all firms identified as market participants (see Issue 3) based on total sales generated within the relevant geographic market for the most recent year for which data are available. If uncommitted entrants may be expected to enter within a year, in response to a small but significant and non-transitory price increase in the relevant product, then such forecast market shares may also be included. In the alternative, parties may stipulate that market shares will be calculated using the most recent revenue data available in the BIA database.

41. Issue 5: *Market Concentration*. The extent of market concentration depends on the number of firms in the market and their respective market shares. Our analytical framework recognizes the Herfindahl-Hirschman Index ("HHI") as a measure of market concentration but finds that the HHI may not be entirely appropriate when applied to the commercial radio industry. The ALJ shall receive testimony, studies, or other relevant economic evidence to determine the appropriate measure of market concentration in the Beaumont metro. In the alternative, the parties may stipulate that the market shares developed in the record pursuant to Issue 4 will be taken as the indicator of market concentration.

42. Issue 6: *Potential Adverse Competitive Effects*. Following our analytical framework and the *Horizontal Merger Guidelines*, the ALJ shall receive testimony, studies and other relevant economic evidence that evaluates the nature and extent of any lessening of competition that might result from the transaction in the relevant product and geographic markets. Evidence concerning the potential lessening of competition by (1) coordinated behavior among competing firms and (2) unilateral effects attributable to the behavior of the post-transaction firm should be developed. Both the examination of the issue and the ALJ's opinion will be informed by the findings developed with respect to Issues 1-5.

43. Issue 7: *Conditions of Entry*. The ALJ shall receive testimony, studies, and other relevant economic evidence concerning the conditions of entry into the relevant product and geographic markets in the Beaumont metro. A transaction is unlikely to create or enhance market power, or facilitate its exercise, if entry into the radio market is sufficiently easy such that market participants, following the transaction, could not profitably maintain an increase in the price of the relevant product following the transaction. In general, the development of the record addressing conditions of entry in the Beaumont metro should follow our analytical framework and the *Horizontal Merger Guidelines*. Thus, evidence concerning the timeliness, likelihood, and sufficiency of entry in the Beaumont metro are essential to reaching a judgment with respect to the efficacy of market entry as a way to offset potential adverse competitive effects that may be identified in the record pursuant to Issue 6. In the alternative, parties may stipulate that entry is so difficult such that it is unreasonable to view it as a factor that may have significant effect as an offset to any increase in market power resulting from the transaction.

44. Issue 8: *Efficiencies*. The ALJ shall receive testimony, studies, and other relevant economic evidence with respect to possible efficiencies that the transaction may produce. In general, the record on efficiencies must show that such efficiencies are both transaction-specific and cognizable as indicated in our analytical framework and the *Horizontal Merger Guidelines*.

45. Issue 9: *Public Interest Benefits*. The ALJ shall receive testimony, studies, and other relevant evidence that documents public interest benefits that the instant transaction will provide listeners and advertisers in the Beaumont metro. Such public interest benefits shall be in addition to efficiencies, if any, documented in the record pursuant to Issue 8 and must be benefits that would not otherwise be realized but for the instant transaction. To count as a public interest benefit, efficiencies must be shown to "flow through" in a measurable way to listeners or advertisers or both. Public interest benefits other than efficiencies may include improvements in the quality, scope, and quantity of community-responsive programming; improved community service; and other commitments to strengthen programming and advertising services that support our long-standing policy of localism in broadcasting. The record on this issue should be of sufficient scope and specificity to enable the ALJ to reach a judgment whether the public interest benefits specific to the transaction are sufficiently certain to result from the transaction and quantitatively and qualitatively substantial enough to offset the adverse effects, if any, of the transaction on competition in the Beaumont metro.

VI. ORDERING CLAUSES

46. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act, the application to assign the license of station KAYD-FM, Silsbee, Texas, from Hilco Communications, Inc. to Cumulus Licensing Corp. IS DESIGNATED FOR HEARING. Unless the parties timely file the joint election to defer as set forth in Paragraph 49 below, the Hearing shall be at a time and place to be specified in a subsequent Order, on the following issue:

To determine, in light of the evidence to be presented in the hearing, whether the public interest, convenience and necessity would be served by the grant of the above-captioned assignment application (File No. BALH-20010731ACB).

47. IT IS FURTHER ORDERED, That pursuant to Section 309(e) of the Communications Act, the burden of proof with the introduction of evidence and the burden of proof with respect to the issue specified in this Order shall be upon Hilco and Cumulus, the applicant parties in this proceeding.

48. IT IS FURTHER ORDERED, That the Commission's Consumer and Government Affairs Bureau, Reference Information Center, SHALL SEND copies of this Order to all parties by certified mail, return receipt requested.

49. IT IS FURTHER ORDERED, That, in the event the parties elect to defer further consideration of the application to assign the license of station KAYD-FM, Silsbee, Texas, from Hilco Communications, Inc. to Cumulus Licensing Corp. in accordance with the interim policy, Hilco and Cumulus SHALL FILE a joint election to defer consideration of the application. Such election SHALL BE FILED within 20 days of the mailing of this Order pursuant to Paragraph 48 above.

50. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order SHALL BE SERVED on the counsel of record appearing on behalf of the Chief, Enforcement Bureau. Parties may inquire as to the identity of such counsel by calling the Investigations and Hearings Division of the Enforcement Bureau at (202) 418-1420. Such

service SHALL BE ADDRESSED to the named counsel of record, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B431, Washington, D.C. 20554.

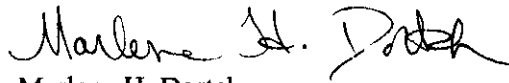
51. IT IS FURTHER ORDERED, That within 15 days of the mailing of this Order pursuant to Paragraph 48 above, the parties may amend their application or file such other information with the Media Bureau as they deem relevant to ameliorate the competition concerns identified in this Order.

52. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, Hilco and Cumulus, pursuant to Sections 1.221(c) and 1.221(e) of the Commission's Rules, in person or by their respective attorneys, SHALL FILE in triplicate, A WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Such written appearance shall be filed within 20 days of the mailing of this Order pursuant to Paragraph 48 above. Pursuant to Section 1.221(c) of the Commission's rules, if the parties fail to file an appearance within the specified time period, the assignment application will be dismissed with prejudice for failure to prosecute.

53. IT IS FURTHER ORDERED, That the applicants, pursuant to Section 311(a)(2) of the Communications Act and Section 73.3594 of the Commission's rules, SHALL GIVE NOTICE of the hearing within the time and in the manner prescribed, and SHALL ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's rules.

54. IT IS FURTHER ORDERED, That the application to assign the license for station KAYD-FM, Silsbee, Texas, from Hilco Communications, Inc. to Cumulus Licensing Corp. WILL BE HELD IN ABEYANCE PENDING THE OUTCOME OF THIS PROCEEDING.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary